No. 85-1551

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IN THE

Supreme Court of the United States

October Term, 1986

ALAN J. KARCHER, as Speaker of the New Jersey General Assembly, *et al.*,

Appellants,

v.

JEFFREY MAY, individually, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals For the Third Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE AMERICAN JEWISH COMMITTEE, THE UNION OF AMERICAN HEBREW CONGREGATIONS, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, AND PEOPLE FOR THE AMERICAN WAY IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political, and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise Clauses, particularly as these principles apply to the nation's public schools.

The American Jewish Committee ("AJC") is an organization of some 50,000 American Jews which was founded in 1906 to protect the civil and religious rights of Jews. It has always been the conviction of AJC that the civil and religious rights of Jews can only be secure if the civil and

religious rights of Americans of all faiths are equally secure. It has also been our belief that religious rights are most secure when the constitutional principle of separation of religion and government is fully observed. AJC believes, therefore, that it is not a proper role of government to promote prayer in tax-supported public schools. Yet that was the manifest purpose of the New Jersey statute under review by this Court. Quite apart from the serious jurisdictional question in the case at bar, no special statute is needed for the secular purpose of allowing students to observe one minute of silence daily in order to make an orderly transition from the outside world to the classroom.

The Union of American Hebrew Congregations ("UAHC") is the nationwide, congregational arm of the Reform Jewish movement and consists of over 800 member Congregations in North America. Through its Religious Action Center and its National Social Action Commission, UAHC has worked consistently to protect the religious, civil, political and economic rights of Jews and all individuals. It has authorized various leaders to testify before the United States Congress and other administrative bodies on matters of concern to the organization and its membership, including issues pertaining to church/state relations and the maintenance of a strong wall of separation between church and state.

People for the American Way is a

member based, non-partisan, education oriented citizens' organization established to promote and protect civil and constitutional rights. People for the American Way was founded in 1980 by a distinguished bipartisan group of religious, civic and education leaders devoted to our heritage of tolerance and pluralism; it now has 250,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of our democratic tradition and defend against attacks from those who would impose their own narrow sectarian views on our free society.

The members of People for the American Way are strongly committed to preserving religious liberty and its constitutional corollary, the separation

of church and state. Religious instruction is the responsibility of parents, churches and synagogues. Our organization opposes state-imposed religion in the public schools, which squarely violates the First Amendment.

People for the American Way works to achieve these goals in a variety of ways, including the national distribution of publications and a speakers bureau of experts on education and church-state issues. People for the American Way also recently initiated a legal defense fund which has provided invaluable assistance to parents and school officials in opposing the establishment of legal precedents that would undermine basic First Amendment guarantees.

This brief was prepared by the

American Jewish Congress on behalf of the National Jewish Community Relations Advisory Council, the national planning and coordinating body for the field of Jewish community relations, and its following national member agencies: American Jewish Committee, American Jewish Congress, B'nai B'rith International, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America--National Women's League for Conservative Judaism, Women's American ORT, and the 113 community member agencies representing all major Jewish communities throughout the United States. These communities are listed in Appendix A.

The Jewish community, through the actions of its representative agencies, has long sought to insure that church and state are kept separate. As a small religious minority in an overwhelmingly Christian country, commitment to the separation principle serves to help maintain the Jewish community's status as political and civic equals in a religiously alien society.

The amici believe that, rather than serving to derogate from the individual and collective exercise of religious liberty, the separation of church and state is an integral and indispensable guardian of that liberty.

At bottom, this case is not about whether one or the other branches of the tripartite test has been violated, or the

proper scope of the accommodation doctrine. This case presents, in stark relief, the question of whether it is the business of government to encourage or promote religious observance; or whether, as the amici believe, it is no business of government to serve as an advocate of religion.

The moment-of-silence itself appears to be relatively innocuous. But the role of the State of New Jersey as an active advocate and promoter of religion is, in the view of the amici, a serious threat to religion, as well as to religious liberty.

Nor do the amici, who include almost all representatives of American Judaism, believe that the separation of church and state, particularly in the public schools, constitutes hostility toward religion.

Rather, they agree with Justice Frankfurter, that:

> the secular public school did not imply indifference to the basic role of religion in the life of the people nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 216 (1948) (concurring opinion).

Finally, the *amici* believe, based on many years of experience, that a judgment upholding the statute would be widely seen as a green light from the Court for further, more intrusive, governmental measures to encourage religion in the public schools. Moreover, this and other similar statutes will not be enforced by lawyers and judges sensitive to constitutional values, or in a forum where overreactions can be easily corrected, and where the victims of the violation are willing and able to complain. It will be applied by school officials, like those of the State of Alabama, who until enjoined by the Court of Appeals in a similar case, asserted a right to pray together with their students, notwithstanding this Court's clear pronouncement to the

contrary. It will be applied behind the closed doors of classrooms where impressionable children prefer conformity to standing out. For these reasons, as well as the more legalistic ones suggested below, the amici urge an affirmance.

The brief is filed with the consent of all the parties. The consents have been filed with the Clerk.

STATEMENT OF THE CASE

This case involves the constitutionality of a New Jersey statute that requires public school teachers and principals to permit students to engage in a moment of silence at the beginning of each school day. The eighteenth in a series of school prayer bills introduced

in the New Jersey Legislature (J.S.A. 6a),[1] N.J.S.A. 18A:36-4 ("the statute") is that body's most recent attempt to reintroduce prayer into the public schools following this Court's opinions holding school prayer unconstitutional. School District of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

The statute provides:

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a 1 minute period of silence to be used solely at the discretion of the individual student,

[1] We follow the appellants' convention of referring to the appendix to appellants' jurisdictional statement as (J.S.A.) and to the Joint Appendix of the parties as (J.A.)

> before the opening exercises of each school day for quiet and private contemplation or introspection.

This action was commenced by Jeffrey May, a public school teacher threatened with disciplinary action for his refusal to enforce the statute in his classroom (J.A. 17-18), and by several New Jersey parents, both individually and on behalf of their children, who are public school students (J.A. 14-17). Named as defendants were Saul Cooperman, Commissioner of the New Jersey Department of Education, the Department of Education, and the boards of education of two municipalities. None of the named defendants saw fit to defend the statute's constitutionality, enacted in December 1982 over the veto of Governor Kean, who determined it to be constitutionally

infirm. (J.A. 381-83). Both houses of the New Jersey Legislature, along with the Speaker of the General Assembly and the President of the Senate intervened, although the Legislature itself has since dropped out of the litigation. The two individual legislators, as intervenors, are the only litigants defending the statute's constitutionality.

Based on an extensive record that included evidence concerning the legislative history of the statute and testimonial evidence from many witnesses about the actual and possible effects of the statute, the District Court found that the statute violated the Establishment Clause of the First Amendment in that it was enacted solely for religious purposes, its primary effects both advance and

inhibit religion, and it fosters excessive government entanglement with religion. (J.S.A. 63a-100a). See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

The Court of Appeals for the Third Circuit affirmed (J.S.A. 1a-61a), agreeing with the District Court that the statute has no secular purpose, but disagreeing on the remaining issues. In affirming, the appellate court accepted the District Court's finding of facts under a "clearly erroneous" standard.

SUMMARY OF THE ARGUMENT

The New Jersey statute violates the Establishment Clause of the First Amendment and should be ruled unconstitutional. As the District Court found, the history of the statute's

enactment can lead only to the conclusion that the sole purpose for the statute is the reintroduction of prayer into New Jersey's schools. Under Lemon v. Kurtzman, supra, the statute is therefore unconstitutional. Appellants' argument of the impropriety of testimonial evidence offered to prove the intent of the Legislature should be rejected. This Court's recent decision in Wallace v. Jaffree, _____ U.S. _____, 105 S.Ct. 2479 (1985), considered similar evidence in striking down an Alabama statute. Moreover, the record is clear that the purpose of the statute is to send a message that religious observance has returned to New Jersey's schools.

Second, the District Court properly found that the statute's primary effect is

both to advance and to inhibit religion. In so finding, the Court properly considered evidence of the actual and projected consequences of the statute's implementation. Of particular import is the effect that the statute has on religious minorities, faced with the choice of absenting themselves from the classroom or of bowing to the pressure of conforming to the majority's activity. Such a choice is precisely what the Establishment Clause was intended to avoid. Therefore, the District Court properly held the statute unconstitutional under Lemon's effects test. The Court of Appeals, while correct in affirming the judgment, improperly analyzed the effect of the statute under a doctrine not applicable to this Establishment Clause

case. Thus, the statute should be held unconstitutional on at least two grounds.

The "clearly erroneous" standard, which was used in reviewing the District Court's decision, was the proper one. The limited exceptions to the "clearly erroneous" standard articulated in Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984), do not apply here. Neither the relative firmness of the governing legal principles nor the potential for bias require the application of a more exacting standard of review than called for in the Federal Rules of Civil Procedure.

What is more, the decision below should be affirmed under any standard of review.

As the District Court found, there was essentially no evidence of a secular purpose for the statute. The secular purpose espoused by appellants at trial was not even conceived until after commencement of this litigation.

Amici, finally, agree with the position of the Solicitor General that the appellants lack standing to maintain this appeal (U.S. Br. at 8-13). In order to avoid repetition amici will rely on this portion of the Government's brief.

The judgment of the Court of Appeals should be affirmed.

ARGUMENT

POINT I

THE STATUTE VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

As this Court pointed out some twenty-five years ago, the considerations

that led the Founders to adopt the Establishment Clause were many. "Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Engel v. Vitale, supra, 370 U.S. at 431. The "coercive pressure upon religious minorities to conform" to state-approved and state-funded religions, fear of religious persecution in the context of state-sanctioned religious beliefs and the perversion of religion through enforcement by the state's police power were also factors leading to the inclusion of the Establishment Clause in the Constitution. Id. at 431-32. See also, Levy, The Establishment Clause: Religion and the

First Amendment (MacMillan Publishing Co. 1986).

This Court's Establishment Clause jurisprudence has developed to further these important goals. Since the Court's 1971 decision in Lemon v. Kurtzman, supra, virtually every case in which this Court has interpreted the Establishment Clause has proceeded under the three-part test established in that case:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612-13. By requiring that a statute pass muster under all three criteria -- purpose, effect and entanglement -- the Lemon test protects

the people from both intentional and inadvertent legislative attempts to place government in the business of religion. Thus, the Lemon test serves to support the foundations of the Establishment Clause.

Both the District Court and the Court of Appeals analyzed this case under Lemon's three-pronged test and held the New Jersey statute unconstitutional under that test. Because the purpose of the statute was the reintroduction of prayer into New Jersey's public schools, and because the primary effect of the statute is the encouragement of prayer with an accompanying "coercive" effect upon religious minorities, the statute is constitutionally infirm under at least two prongs of the test.

A. The Statute is Unconstitutional Because it Lacks a Secular Legislative Purpose.

Both of the lower courts found that the statute lacks any secular purpose, which rendered it unconstitutional without further analysis. This Court, it is respectfully submitted, should do the same. "When both courts below are unable to discern an arguably valid secular purpose, this Court normally should hesitate to find one." Wallace v. Jaffree, supra, 105 S.Ct. at 2495 (1985) (Powell, J., concurring).

The District Court's ruling was based on a series of factual findings set forth in the opinion. Included among them was the following:

> 5. The purpose of Bill 1064 [the statute] was to mandate a period at the start of each school day when all students

> would have an opportunity to engage in prayer. . .

(J.S.A. 86a). The Court reached this conclusion after considering extensive testimonial and documentary evidence on the issue of legislative intent.

In the absence of any official record of legislative proceedings, the court permitted the testimony of several individuals who had witnessed portions of the legislative process.[2] The issue of religion had dominated the legislative debates. For example, Reverend Dudley E. Sarfaty, who attended some of the

[2]The Court also permitted the introduction into evidence of newspaper articles under Rule 803(24) of the Federal Rules of Evidence. Given the absence of a legislative record, the District Court acted properly in admitting the articles into evidence under that rule. In any event, these played no role in the findings concerning the purpose of the statute (J.S.A. 85a), and therefore should play no role in this appeal.

legislative debate, testified that Senator Addabbo had stated that "it would be a good thing if the state would subsidize parochial education, and that this Bill was a good step in that direction." (J.A. 368). Backers of the bill, A-1064, issued pro forma denials of religious purpose, but aside from conclusory, self-serving declarations that the bill had some unarticulated secular function, the record is bare of any evidence that the Legislature had given serious consideration to any plausible or even understandable secular purpose.

The Court further took into account the history of the introduction of related bills by members of the New Jersey Legislature, including those introduced by a sponsor of the statute. That sponsor,

Assemblyman Zangari, had been quoted in the testimony of witnesses who attended the legislative debate and hearings as having said that he introduced the bill for religious purposes. For example, one witness testified:

> Yes. I recall very vividly that he talked in his testimony about his own background. He said that although he was a Catholic by conviction, as a child he had gone to Protestant schools. He had been encouraged to participate in Protestant oriented prayer, and he said prayer had never done him any harm.

(J.A. 270)(testimony of Joseph Nathan Chuman, Ethical Culture Society of Bergen County).

In fact, the entire history of the bill's passage contains no evidence of secular purpose that its defenders could later use. Marianne Rhodes, who

attended Senate and Assembly committee hearings, testified that there was no discussion of any educational uses for a moment of silence. She further testified that Assemblyman Zangari had argued that the bill could help "our society get back to the religious values which are deeply imbedded in our ideals." (J.A. 275). The record shows that no educational professional or other expert testified before a legislative committee to show any allegedly secular educational benefits of a moment of silence. Indeed, such education professionals as did testify opposed the bill.

The District Court rejected as "an after-the-fact rationalization" the appellants' position that the statute serves the educational purpose of creating

a transition from home life to school work. (J.S.A. 87a). In fact, on cross examination, appellants' expert witness admitted that he was not asked to look into the purpose of the statute until after its enforcement had been enjoined by the District Court in this case, even though a legislative aide with responsibility for the bill was his neighbor and frequent driving companion. (J.A. 357-58).

The evidence virtually forces any reasonable trier of fact to conclude that educational purposes had nothing whatsoever to do with the enactment of the statute. Not only does it appear that none of New Jersey's educational organizations supported enactment, but none of the original defendants, all involved in the education of New Jersey's children, was

even willing to defend this lawsuit. No evidence was offered showing any debate on the issue of whether the moment of silence law would provide a transition from home to school. It is inconceivable that the statute was enacted for purposes that no one ever mentioned until after the commencement of this constitutional challenge.

Furthermore, it is implausible to suppose that the Legislature would enact a statute requiring teachers to exercise for pedagogical purposes a power that they had without any additional legislation -- the power to insist that students be quiet. Without any evidence, appellants invite this Court to assume that the Legislature, never mentioning it in debate or hearings, made a universal pedagogical decision

concerning student alertness in the morning. The Court should decline this invitation. Under any standard of review, the District Court's findings that the statute was enacted for religious, and not educational purposes, should be affirmed.

Appellants' argument that the District Court erred in its conclusion that the statute lacks a legitimate secular purpose is entirely evidentiary. Appellants severely criticize that Court, as well as the Court of Appeals, for what they term "a wholly unprecedented judicial search for legislative purpose." (App. Br. 29). Relying heavily on United States v. O'Brien, 391 U.S. 367 (1968), appellants argue that the courts are constrained to consider only the language of the statute as evidence of the legislative intent.

Appellants have misconstrued the law. This Court has consistently relied on precisely the types of evidence that form the basis of the opinions below. This is not surprising since in most instances, including that of the New Jersey statute before the Court, the only evidence of the statute's purpose will be evidence related to the legislative history. Couched in evidentiary terms, appellants' position actually asks the Court to abandon the substance of the purpose test.

Most recently, in Wallace v. Jaffree, supra, this Court relied heavily both on statements of individual legislators, 105 S.Ct. at 2483, 2490, and on the prior acts of the Legislature, 105 S.Ct. at 2491-92, in striking down an Alabama moment of silence law. In fact, Justice Stevens'

majority opinion in Jaffree refrained from a detailed analysis of statutory language, in the light of such strong evidence of the religious purpose of the legislation. 105 S.Ct. at 2493. While Justice O'Connor would give more weight to evidence of legislative history and less to the motives of individual legislators, her concurrence concluded that the "Alabama statute was intended to convey a message of state encouragement and endorsement of religion." 105 S.Ct. at 2502 (O'Connor, J. conncurring). Justice O'Connor further warned against the formulation of a "sham secular purpose," in order to fabricate a record for judicial review. Id. at 2500. See Stone v. Graham, 449 U.S. 39 (1981)(rejecting "avowed" secular purpose of requirement that Ten Commandments be posted).

The so-called secular purpose espoused by the appellants is a sham. To the extent that the record contains any support for the notion of a beneficial transition period, that evidence goes to the effect of the statute -- not to its purpose. It is conceivable that a statute enacted entirely for religious purposes will have a number of ramifications, some of them secular. But this does not render such a statute constitutional. Government must not be permitted to legislate religious exercises into the public schools and to defend its doing so on the ground that some of the consequences are positive from a secular point of view. Amici are committed to the perspective that religious observance forms the foundation of many values important to human interaction in today's world.

However, this does not mean that our public schools are the place in which religious activity should occur.

In his amicus brief, the Solicitor General argues for a substantial departure from the analysis of the Establishment Clause set forth in Lemon v. Kurtzman and its progeny. Likening the statute to other governmental activities that accommodate religion without taking a stand on its virtues, the Solicitor General takes the position that governmental creation of an opportunity for prayer in the schools is permissible, while governmental promotion of religion is not. (U.S. Br. 24).

The distinction drawn by the Solicitor General will not always be a real one, and cannot be maintained in this case. Where, as here, the evidence clearly shows that by

enacting the statute government is "conveying or attempting to convey a message that religion...is favored or preferred," Wallace v. Jaffree, supra, 105 S.Ct. at 2497 (O'Connor, J., concurring), the statute fails to meet the standards of the Constitution. While the Establishment Clause permits the government to create an opportunity for prayer (children are not prohibited from praying privately during the free time in the public schools), the government may not create such an opportunity for the purpose of endorsing religion or a particular set of religious beliefs.

Moreover, as Justice Stevens points out in Wallace v. Jaffree, supra, the entire issue of accommodation does not even arise absent a showing that governmental

practice had been impeding children from praying each morning. 105 S.Ct. at 2491, n. 45. No such impediment has been alleged in this case.

Virtually all of the school prayer statutes held to be unconstitutional can be seen as mere accommodations to religion under the Solicitor General's analysis. For example, in Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd., 455 U.S. 913 (1982), the Fifth Circuit, in a decision affirmed by this Court, struck down a Louisiana statute that permitted, but did not require, public school students to pray. Holding that the voluntary nature of the prayer exercise was "not relevant to the Establishment Clause inquiry", 653 F.2d at 902, the Court pointed out that "an Establishment Clause violation does not

depend upon the presence of actual government coercion." Id. See School District of Abington Township v. Schempp, supra, 374 U.S. at 211-13; Engel v. Vitale, supra, 370 U.S. at 430. In Schempp, the Court specifically held that the voluntary nature of the required exercises was not sufficient to remove the statutes from the reach of the Establishment Clause. 374 U.S. at 224-25. See also Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

Similarly, the ability of students to excuse themselves from the classroom does not render New Jersey's moment of silence statute constitutional. Young children should not be faced with the unhappy choice between participating in a ritual that offends their religious beliefs or sending themselves out of the room as members of a

religious minority. Children frequently enough find themselves under pressure to conform to the views of their peers. For government to put children in this unenviable position would be an act inconsistent with the purposes of the Establishment Clause. Most affected by such governmental involvement in religion are religious minorities, especially those who do not adhere to any religion at all. Wallace v. Jaffree, supra, 105 S.Ct. at 2497 (O'Connor, J., concurring); Engel v. Vitale, supra, 370 U.S. at 431-32. Asked about the effect that the statute would have on atheists, Assemblyman Zangari was quoted as saying, "those people are so few in number, that those interests, we can basically afford to discount [them]." (J.A. 271). That, however, is what the

Constitution forbids. For these reasons, it is respectfully submitted that the Solicitor General's position should be rejected.

B. The Primary Effect of the Statute is to Advance Religion

The statute's lack of a legitimate secular purpose is sufficient to render it unconstitutional under Lemon v. Kurtzman, supra. The statute, however, violates the Establishment Clause for the additional reason that its primary effect is to advance religion. The District Court so held on the basis of a careful and thorough evaluation of the evidence. Because this finding was not clearly erroneous (see Point IIA, infra), the Court of Appeals itself erred in reversing this finding, although the error did not

affect that Court's correct holding that the statute was unconstitutional.

The District Court found that the effects of the statute will vary from community to community. The Court of Appeals disagreed, holding that the statute's principal effect is an accommodation to those who wish to pray, and not the advancement of religion, despite the religious purpose of the statute. With respect to those students who do not wish to participate, the Court of Appeals held that requiring them to sit quietly through the exercise, as occurred in at least one school district, was an acceptable time, place and manner regulation for the protection of the rights of those who wish to observe the exercise.

We respectfully submit that the Court of Appeals incorrectly introduced the doctrine of time, place and manner regulation into this Establishment Clause case. The cases relied upon by the Court concern regulation of expression protected by the Free Exercise Clause. For example, in Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981), the Court upheld a Minnesota regulation requiring that the distribution of written materials at a state fair be confined to a particular area of the fairgrounds. The Establishment Clause was not implicated in that case. Had the regulation in question required that the distribution occur at a time or in a manner offensive to the religious views of the Krishna Society, the case would be of

greater relevance. Never did the Court in Heffron conclude that time, place and manner regulations can be used to require individuals to remain silent in a particular locale while others pray. For similar reasons, the other Free Exercise Clause cases cited by the Court of Appeals are irrelevant. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983)(regulation of access to teachers' mailboxes by unions upheld); United States Postal Service v. Council of Greenburgh Civil Associations, 453 U.S. 114 (1981) (statute upheld prohibiting placement of unstamped material into letterboxes).

In the case before the Court, free exercise is not an issue. No one who wishes to pray at New Jersey's public

schools has argued that the absence of a daily moment of silence prohibits him or her from doing so. On the other hand, considerable evidence was presented as proof that the statute would have, and was already having, a substantial effect on those who, for religious reasons, wished to refrain from observing the moment of silence. Plaintiff May, a teacher, had already been threatened with disciplinary action. In at least one school system, the objections of many parents, teachers and students made implementation difficult. In others, the statute seemed to have no effect, religious or otherwise. Experts testified as to the likely psychological and educational effects of the statute.

The District Court held that "[w]hile

this form of legislation advances the religion of some, it inhibits the religion of others..." (J.S.A. 95a). Based on the extensive record, the Court determined that the religious ramifications of the statute were extensive. Among them:

> Finally there are those who profess no religion and to whom any form of prayer is offensive. Bill 1064 requires these persons to assume a posture suggestive of particular forms of prayer which are responsive to particular beliefs about ultimate reality. Understandably those who do not share those beliefs do not wish to be required to maintain a pose which suggests that they do. Children holding these views, as illustrated in the present case, are forced either to endure an exercise which runs counter to their beliefs or to face public opprobrium or ridicule by asking to be excused each day.

(J.S.A. 97a).

The finding that, among the various potential effects of the statute, the primary effect was both to advance and inhibit religion cannot be held to be clearly erroneous. At a minimum, it is an entirely reasonable interpretation of the record. The effect on those children and teachers whose religious views are offended by the exercise is especially profound. For these reasons, and because the Court of Appeals misapplied the law regarding regulation of free speech to this case, the statute should be struck down in that its primary effect, religious in nature, runs afoul of the Establishment Clause.

POINT II

THE COURT OF APPEALS APPLIED THE PROPER STANDARD OF REVIEW

In reviewing the District Court's factual findings, the Court of Appeals applied the proper standard, the "clearly erroneous" test of Rule 52(a), Fed. R. Civ. Pro., and applied it in the proper fashion. Moreover, the District Court's findings would have to be affirmed even under the more searching standard of review championed by appellants and the dissenting judge below.

More fundamentally, however, the standard-of-review question, though of some theoretical interest, is of limited practical importance here. When the District Court found that the New Jersey legislature lacked an authentic secular purpose in enacting the statute, it relied

on essentially all the evidence any district judge is ever likely to have. If it is true "that our courts are capable of distinguishing a sham secular purpose from a real one," Wallace v. Jaffree, supra, 105 S.Ct. at 2500 (O'Connor, J., concurring), they must be able to do so on substantially the same type and amount of evidence as the District Court had here.[3]

We submit that the argument for a searching standard of factual review is really the disguised assertion that a facially neutral moment of silence

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[3] In some states, unlike New Jersey, there may be an "official legislative history," Wallace v. Jaffree, 105 S.Ct. at 2500 (O'Connor, J. concurring) on which a court may rely. In other cases, unlike this one, legislators who cannot be compelled to testify may volunteer to do so. Where such better evidence is available, it may be appropriate to require resort to it, but that is not this case and will not be the usual case.

statute has a saving secular purpose as a matter of law. We submit, however, that the District Court's findings of fact must be sustained, on any standard of review, if the facts matter at all.

A. The Court of Appeals Properly Affirmed the District Court's Findings Under the "Clearly Erroneous" Standard of Rule 52(a)

1. The "Clearly Erroneous" Standard is the Correct Standard

Ordinarily, appellate review of factual findings is limited. When a District Court has found a fact, the finding "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. Pro. 52(a).

In rare circumstances, however, courts of appeals, and this Court, engage in something more exacting than this "clearly erroneous" review. It is admittedly difficult to articulate when such review is called for. See, e.g., Bose Corp. v. Consumers Union of United States, Inc., supra; Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229 (1985). It appears, however, that two situations tend to lead to independent appellate review of facts.

First, when the governing legal principle is insufficiently developed or so inherently indefinite that it "can be given meaning only through its application to the particular circumstances of a case, the Court has been reluctant to give the trier of fact's conclusions presumptive

force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." Miller v. Fenton, ___ U.S.___, 106 S.Ct. 445, 452 (1985). See, e.g., Bose, supra; Monaghan, supra, 85 Colum. L.Rev. at 273-75. Second, the potential for systemic or other bias against federal rights elsewhere in the judicial system has justified independent appellate review of factual findings. Miller v. Fenton, supra, 106 S.Ct. at 452; Norris v. Alabama, 294 U.S. 587 (1935); Monaghan, supra, 85 Colum. L. Rev. at 272-73.

Neither situation exists here, and thus no independent review of the District Court's factual findings is warranted. The governing legal standard has meaning enough that it can be applied

straightforwardly to adequately established historical facts. A sham secular purpose is no secular purpose, and whether an asserted secular purpose is a sham is purely a matter of historical fact. Furthermore, whatever danger there may be of systemic or other bias in cases such as this is obviated where, as here, the only parties with a federal right at stake prevailed. Since schoolchildren who wish to pray silently in the public schools are always free to do so, their rights could not be affected by any decision in this case. The only parties whose rights could be endangered by biased, disingenuous, or merely incorrect fact-finding have prevailed and do not require the protection of further factual review. Cf. Planned Parenthood

Association v. Chicago Transit Authority, 767 F.2d 1225, 1228-29 (7th Cir. 1985).

Because this case presents none of the special circumstances calling for independent appellate review of the facts, therefore, the "clearly erroneous" standard applied by the Court of Appeals was the correct standard.

2. Under the "Clearly Erroneous" Standard, The District Court's Judgment Was Properly Affirmed

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The majority of the Court of

Appeals had no such "definite and firm conviction," and on the record before them they could not have.

The District Court's "account of the evidence is plausible in light of the record viewed in its entirety;" therefore, "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." Anderson v. City of Bessemer City, North Carolina, __ U.S.___, ___, 105 S.Ct. 1504, 1512 (1985). Here, the District Court took one of "two permissible views of the evidence, [therefore] 'the fact-finder's choice between them cannot be clearly erroneous." Id.

In part B, infra, we demonstrate that the evidence in this case withstands even

plenary review. At the very least, it is impossible to deny that the District Court's findings reflect a permissible view of that evidence. Those findings, therefore, must be affirmed.

B. The District Court's Findings of Fact Must be Affirmed Under Any Standard of Review

The District Court found that the only secular purpose offered for the statute was a pretext. The District Court also found evidence of religious purpose. Under any standard of review, those findings must be affirmed. The historical facts on which they were based were largely undisputed, and the inferences of purpose were the only sensible ones.

The Reverend Dudley Sarfaty, who witnessed the veto override debate, said:

"It would be fair to say that almost the entire legislative debate on the bill focused on whether or not A-1064 was 'a prayer bill'." (J.A. 37). Various legislators, of course, denied that it was a "prayer bill" and said it had a secular purpose, but none defended that position by reference to any secular facts developed in committee hearings or previous studies, or even by reasoned argument.

The Reverend Sarfaty, asked directly "whether or not there were any discussions of any substantial nature concerning the pedagogical objectives or purposes of Assembly Bill 1064," responded:

> No, there weren't. There were no discussions that I recognize as related to pedagogy. The only one was a kind of social control

> argument that Senator Dumont used.

(J.A. 371).

Senator Dumont's "social control argument" was that "he thought this kind of ceremony in school would cut down crime and disruption," (J.A. 369. See also J.A. 68), an argument often put forward in support of school prayer, but never seriously asserted, not even by appellants' witnesses, as a possible benefit of mere secular silence.

At a time, then, when demonstrating --or even articulating--a plausible secular purpose was of vital importance, the proponents of the bill were silent.

All of this evidence is undisputed and more than sufficient to support the District Court's finding that:

> The attempt to develop rational support for the thesis that a minute of silence served a transitional purpose commenced after this law suit was underway rather than before the Bill was adopted.

(J.S.A. 88a).

Even the controverted evidence adds support to the District Court's findings that the only purported secular purpose of the statute was a sham.

Experts testified on the pedagogical merit of a moment of silence. Dr. Scrupski for appellants and Drs. Kuriloff and Rosner for appellees disagreed on whether the moment of silence would perform any legitimate secular function at all. Even if only Dr. Scrupski's testimony were credited, however, the most that could be said is that a moment of silence forms a "boundary between the

world of not-school and that of school." (J.A. 353).

But the District Court was entitled to recognize that such a secular purpose, even if real, is not the stuff of public controversy. The District Court was entitled to take judicial notice that while the question whether there ought to be prayer in school arouses deep emotion, the question whether there ought to be a 60-second boundary between school and not-school does not. The record of vehement public debate over the statute amply justified the District Court's conclusion that "only the utterly naive would conclude that the Bill's advocates were fighting passionately for establishment of such a boundary." (J.S.A.

90a).[4]

On any standard of review, then, the evidence establishes that the legislature had no bona fide secular purpose. If this evidence does not support the District Court's findings, no evidence likely to be available in the real world ever will. If shams are to be detected at all, they must be detected on evidence like that before the District Court in this case.

The consequence of reversing the District Court's findings would be to insulate from review any facially neutral moment of silence statute so long as legislators put into the record

[4] This record of vehement public debate is further supported by a history of attempts by the New Jersey legislature either to reintroduce prayer in the public schools or to enact moment of silence laws.

conclusory invocations of secular purpose. But if evidence matters at all, we submit that the evidence here is more than sufficient to require affirmance, however closely examined.

CONCLUSION

For the reasons set forth above, this appeal should be dismissed. Should the Court reach the merits, the judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

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